138-293

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1343.

THE UNITED STATES, APPELLANT,

v.

JAMES G. GREEN.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 4, 1890.

SUPREME COURT OF THE UNITED STATES.

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No. 1343.

THE UNITED STATES, APPELLANT,

v.

JAMES G. GREEN.

APPEAL FROM THE COURT OF CLAIMS.

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In the Court of Claims.

JAMES G. GREEN
vs.
THE UNITED STATES. } No. 16352.

I. *Petition filed Oct.* 23, 1888.

To the honorable the Judges of the Court of Claims:

The petition of James G. Green respectfully shows to your honors:

That he is a citizen of the United States, and an officer of the Navy thereof, to wit, a commander, and that the record of his appointments in the service is a follows:

Acting master's mate, 11 May, 1861.
" ensign, 27 Nov., 1862.
" master, 11 Aug., 1864.
Master, 12 Mar., 1868.
Lieutenant, 18 Dec., 1868.
Lieut. commander, 3 July, 1868.
Commander, 6 March, 1887.

Your petitioner further says, that the lowest grade having graduated pay held by him since entering the service is that of lieutenant-commander, and that the pay of said grade, since petitioner has held the same, has been graduated by act of July 15, 1870, to increase by $200 per annum after four years' service therein.

Your petitioner says that he is, under the provisions of the act of Congress, approved March 3d, 1883 (22 Stats., 473), entitled to have credit given him upon his said grade of lieut. commander, for all of his service as above stated, prior to the date of his said commission as a lieut. commander, to wit, 9 years, 1 month, and 22 days, and that he is entitled to the difference of pay, resulting from such credit, to wit, to the sum of $796.08, all of which remains due and unpaid, for which amount he asks judgment.

Your petitioner further says that he is the sole owner of this claim, and has never assigned the same, or any part thereof, to any person; that he has never borne arms against, or given aid or comfort to rebellion against, the Government of the United States, and that he is entitled to the amount herein claimed, after allowing all just credits and offsets.

JAMES G. GREEN,
By JNO. PAUL JONES,
Att'y.

DISTRICT OF COLUMBIA, *ss.*

John Paul Jones, being first duly sworn, says that he is the attorney of James G. Green, and the matters stated in the foregoing petition are true to the best of his knowledge and belief.

JOS. W. AMAN,
Com'r Ct. Cls.

2 II. *General traverse, filed Oct.* 24, 1888.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

3 III. *Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Claimant is a commander in the Navy of the United States, with the following record of entry and promotion:

Volunteer service.—Acting master's mate, 7th May, 1861; acting ensign, 27th November, 1862; acting master, 11th August, 1864.

Regular service.—Master, 12th March, 1868; lieutenant, 18th December, 1868; lieutenant-commander, 3d July, 1870; commander, 6th March, 1887.

II.

He has never received any benefit of longevity pay under the act of March 3, 1883. (22 Stat., 473.)

III.

If his prior service were credited on his grade of lieutenant-commander he would be entitled under that act to $796.08.

IV.

If credited on his grade of lieutenant with his service in prior grades he would be entitled under the act of 1883 to $4.17.

CONCLUSION OF LAW.

And upon the foregoing findings of fact the court decides as conclusion of law:

The claimant should recover of the defendant the sum of $796.08.

IV. *Opinion.*

NOTT, J., delivered the opinion of the court:

This is an action brought by a naval officer to recover longevity pay. The single question presented by the case is whether this longevity pay shall be computed on one grade or on another.

On the 1st July, 1870, the claimant was a lieutenant in the Navy; on the 15th he was a lieutenant-commander; between these two dates,
4 viz, on the 3d July, he had passed from the one position to the other by promotion; that is to say, he had ceased to be a lieutenant and had become a lieutenant-commander.

On the 3d of July, when the claimant thus exchanged offices, neither had attached to it what is known as longevity or graduated pay; but on the 15th of the same month Congress passed an act—the naval appropriation act, 15th July, 1870 (16 Stat. L., 321, sec. 3)—which attached graduated pay to both. The office of lieutenant-commander, consequently, was the first grade having graduated pay ever held by the claimant, and the lowest.

On the 3d of March, 1883, Congress enacted another law, which is the statutory foundation of the claimant's right of action, the naval appropriation act 3d March, 1883 (22 Stat. L., pp. 472, 473, sec. 1). This act declares that all officers in the Navy shall be credited with the actual time they may have served, and shall receive all the benefits of actual service in all respects in the same manner as if the service had been continuous, and in the regular Navy; but this computation of actual time is to be limited to and based upon "the lowest grade having graduated pay held by such officers since last entering the service." As we have previously seen, "the lowest grade having graduated pay held" by the claimant was that of lieutenant-commander, a grade which he had acquired on the 3d July, 1870, and to which graduated pay was attached after he acquired the office, viz, on the 15th of that month.

If, then, the grade of lieutenant-commander was "the lowest grade having graduated pay" ever held by the claimant; or, conversely, if there was no lower grade having graduated pay attached to it which the claimant had previously held and received the benefit of, why does not the grade of lieutenant-commander precisely answer to and comply with the requirements and conditions of the act 1883.

The negative answer to this question, suggested by the accounting officer of the Treasury, is to be found in the opening sentence of the third section of the act 15th July, 1870, the statute which first attached graduated pay to both of these positions. It is in these words:

"From and after the thirtieth day of June, eighteen hundred and seventy, the annual pay of the officers of the Navy on the active list shall be as follows. (16 Stat., 330.)"

No better illustration can be found of the tireless vigilance and minute scrutiny which watch over the innumerable claims and demands that beset the Treasury than this application of these two lines to this officer's claim for his statutory compensation. But while the court does appreciate and commend the vigilance and the scrutiny which thus watch over the interests of the Government, in at least one of its Executive Departments, it can not hold that a provision which made the new pay of all naval officers

begin to run from a designated day, whether antecedent or prospective, can modify the plain language of the act 1883. That act declares that an officer's graduated pay shall be computed according to "the lowest grade having graduated pay held" by him; and the Supreme Court has decided that this means having graduated pay attached to the office at the time the officer held it, and not "after he had ceased to hold it." (Rockwell's Case, 120 U. S. R., 60.)

Whether the graduated pay was attached to the office of lieutenant in the Navy by immediate legislation or by prospective legislation or by retroactive legislation is immaterial if it was not attached until after the officer had ceased to be a lieutenant; and conversely if the office of lieutenant-commander was the lowest grade held by the officer which had graduated pay attached to it at the time when he held it, it is the grade referred to in the act of 1883 upon which his graduated pay must be computed.

The judgment of the court is that the claimant recover of the defendant the sum of $796.08.

V. *Final judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 7th day of May, A. D. 1890, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant and do order, adjudge, and decree that the said James G. Green do have and recover of and from the United States the sum of seven hundred and ninety-six and $\frac{8}{100}$ dollars ($796.08).

VI. *Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 7th day of May, 1890, in favor of claimant, the defendants, by their Attorney-General, on the 3rd day of July, 1890, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Assistant Attorney-General.

Filed July 3, 1890, and allowed.

WILLIAM A. RICHARDSON,
Chief-Justice.

In the Court of Claims.

VI.

JAMES G. GREEN
vs.
THE UNITED STATES. } No. 16352.

I, Archibald Hopkins, Clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the

application of the defendants for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereto set my hand and affixed the seal of said court at Washington, this fifth day of August, A. D. 1890.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsed on cover:) No. 1343. The United States, appellant, vs. James G. Green. Court of Claims. Filed October 4, 1890.

Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
JAMES G. GREEN.
} No. 1343.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT.
vs.
JAMES G. GREEN. } No. 1343.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

THE CASE.

This is an appeal from a judgment of the Court of Claims for $796.08 in favor of the appellee, Green, as longevity pay due to him as a naval officer, under the act of March 3, 1883 (22 Stat. L., 473).

The provision of that act which is involved is as follows:

> And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or

navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and *in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service.*

The question at issue is what was the lowest grade having graduated pay held by Green since he last entered the service. The court held that it was the grade of lieutenant commander, and on that conclusion gave judgment for $796.08 as for continuous service in that grade for a period of more than nine years, which was the time of his prior service in the volunteer and regular navy. The claim of the Government was that the lowest grade having graduated pay held by Green was that of lieutenant, which, if correct, reduced his longevity pay to $4.17.

Green last entered the service as master March 12, 1868; was appointed lieutenant December 18, 1868; was appointed lieutenant commander July 3, 1870, and commander March 6, 1887.

By section 15 of the act of July 16, 1862 (12 Stat. L., 583, 586), neither masters nor lieutenants, nor lieutenant commanders received graduated pay. This act continued in force until July 15, 1870, when by the naval appropriation bill of that year it was provided that from and after the 30th of June, 1870, the pay of both lieutenants and lieutenant commanders should increase, the former after five years' service, the latter after four years' service. The pay in both grades was thus made graduated. On July 1, 2, and 3, 1870, Green was a lieutenant, and he subsequently received pay under the law of July 15, 1870,

for those days as such. Before July 15, 1870, he became lieutenant-commander. Does the fact that this act of Congress was not passed until after the services were rendered and he had been promoted, prevent the grade of lieutenant from being one "having graduated pay held by" him? The Court of Claims held that it does. We claim that it does not.

ARGUMENT.

The grade, necessary to be determined here, is defined by the statute to be the lowest grade in the regular Navy having graduated pay held by such officer since last entering the service. Pay is fixed by statute. This definition, then, is to be construed in the light of prior statutes fixing pay.

What statute fixed the pay of lieutenants for the first three days of July, 1870? If words mean anything it was the act of July 15, 1870. That was an appropriation bill drawn before June 30, 1870, and intended by Congress to apply to the year beginning July 1, 1870, and ending June 30, 1871. It was delayed in its passage until after the beginning of the year which it was intended to provide for. Nevertheless it was made to apply to the whole year and to be retrospective as to that part of the year already passed when the act was approved. By the first section of the act (16 Stat. L., 321) money was appropriated by Congress "for the naval service of the United States *for the year ending the thirtieth of June, eighteen hundred and seventy-one*," that is, for the year be-

ginning July 1, 1870. By section 3 of the same act it was provided—

> That *from and after the thirtieth of June, eighteen hundred and seventy*, the annual pay of the officers of the Navy on the active list shall be as follows:
>
> * * * * *
>
> Lieutenant commanders, during the first four years after date of commission, when at sea, two thousand eight hundred dollars; on shore duty, two thousand four hundred dollars; on leave or waiting orders, two thousand dollars; after four years from such date, when at sea, three thousand dollars; on shore duty, two thousand six hundred dollars; on leave or waiting orders, two thousand two hundred dollars.
>
> Lieutenants, during the first five years after date of commission, when at sea, two thousand four hundred dollars; on shore duty, two thousand dollars; on leave or waiting orders, one thousand six hundred dollars; after five years from such date, when at sea, two thousand six hundred dollars; on shore duty, two thousand two hundred dollars; on leave or waiting orders, one thousand eight hundred dollars.

Section 4 of the same act provides—

> That the pay prescribed in the next preceding section shall be the full and entire compensation of the several officers therein named, and no additional allowance shall be made in favor of any of said officers on any account whatever, and all laws or parts of laws authorizing any such allowance, *shall on the first day of July, eighteen hundred and seventy, be repealed.* * * * *And from and after the thirtieth day of June, eighteen hundred and seventy*, so much of the fourth section of the act approved July fourteen, eighteen hundred and sixty-two, "Making appropriations for the naval services for the year ending

> June thirty, eighteen hundred and sixty-three, and for other purposes" as allows to persons in the naval service five cents per day in lieu of the spirit ration, *is hereby repealed; and from and after that day* thirty cents shall in all cases be deemed the commutation price of the navy ration.

Congress could not have made plainer its intention that the pay of lieutenants from June 30 to July 15, 1870, should be graduated. It not only provided expressly that it should be so, but it appropriated the money in the same act to pay the lieutenants in accordance with this provision. It is true that by the pay law in force on July 1, 2, and 3, 1870, which was the act of July 16, 1862 (12 Stat. L., 583, 586), the pay of lieutenants was not graduated, but the effect of the act of July 15, 1870, was to repeal the act of 1862 in its application to the first fifteen days of July, 1870.

The act to be construed is the act of 1883. When that was passed the law which determined the lawful pay for services rendered on July 1, 2, and 3, 1870, by lieutenants was not the act of 1862, but the act of July 15, 1870. If the act of July 15, 1870, was a valid law in its retrospective operation, it is impossible to escape the conclusion that when the law of 1883 went into effect the lawful pay for services rendered by lieutenants on July 1, 2, and 3 was graduated. If the act of July 15, 1870, had reduced the pay for services rendered before its passage, it would have been open to the objection of disturbing vested rights.

Instead of decreasing the pay for such services, however, the act increased it and appropriated the money to

cover the increase. The pay of a lieutenant under the act of July 16, 1862 (12 Stat. L., 583, 586, sec. 15), was, when at sea, $1,875, when on shore duty, $1,500, and when on leave or waiting orders, $1,200. Under the act of July 15, 1870, as we have seen, the sea pay of a lieutenant for the first five years of service was $2,400 when at sea; $2,000 when on shore duty, and $1,600 when on leave or waiting orders. After five years' service the pay was increased by $200 in each kind of service. There was, therefore, by the act of July 15, 1870, an increase of pay for services rendered by lieutenants during the first fifteen days of that July, at the rate of from $400 to $600 per year, *i. e.*, of from $1.10 to $1.66 per day. The validity of the retrospective feature of the act is, therefore, beyond question.

It will hardly lie in the mouth of the appellee here to object to the retrospective feature of the act of July 15, 1870, when it is considered that the provision of the act of March 3, 1883, under which he claims here to recover, is itself retrospective in that it imparts to services of appellee in the volunteer navy the character of services in a certain grade in the Regular Navy and thereby confers upon him a benefit not provided or contemplated when he rendered them.

It was claimed below that it would be disturbing a vested right to longevity pay in this case if the act of July 15, 1870, was given the effect of affixing graduated pay to services rendered before its passage. When that act was passed, no right to such longevity pay existed. It did not accrue until thirteen years afterwards, by the act of 1883. Just how an act can disturb a right which could

not vest until thirteen years after the act had become the law, it is difficult to understand.

The court below did not make a finding as to what pay the claimant received for the days in July, 1870, while he continued to be a lieutenant. But this omission of the court has been covered by a stipulation between counsel filed herein, which is printed with this brief, and from which it appears that Green was paid from and including July 1 to July 3 as a lieutenant "at sea" in the first five years at the rate of $2,400 per annum, under the act approved July 15, 1870. The same thing would be presumed in the absence of the finding. See *United States* vs. *Ripley* (7 Peters, 18, 25), where Justice McLean, speaking for this court, says:

> It is presumed that every person who has been engaged in the public service has received the compensation allowed by law, until the contrary shall appear.

Now the increase of pay for services as lieutenant under the act of July 15, 1870, which Green took the benefit of, was at the rate of $525 per annum or $1.43 per day. Green then is in the position of taking graduated pay for services as a lieutenant allowed to him by law, and of claiming that the lieutenancy was not a "grade having graduated pay, held" by him. Having accepted the benefit of the act of July 15, 1870, in its retrospective operation, it is respectfully insisted, that he can not now be heard to deny that the lieutenancy during July 1, 2, and 3 was a grade having graduated pay by law.

The case of *United States* vs. *Rockwell* (120 U. S. R., 60) does not, when properly considered, help the claim of

the appellee. Rockwell reëntered the service as master in March, 1868. On December 16, 1868, he became lieutenant, and continued a lieutenant until February, 1878. By the act of July 15, 1870, the pay of the grade of master was graduated. The Government there claimed that the lowest grade having graduated pay held by him was that of master; but this court, affirming the Court of Claims, held otherwise, because Rockwell had ceased to be master two years before it was made a graduated pay rank. Rockwell never became entitled by law to graduated pay for his services while master and never received such pay therefor as Green did for his services while lieutenant. Therein is the wide distinction between the cases.

Said Mr. Justice Harlan, speaking for the court in the Rockwell case:

> It thus appears that when the rule of graduated pay was applied by the act of 1870 to lieutenants, masters, and other officers of the Navy, Rockwell held the position of lieutenant. That was not the lowest grade held by him after "last entering the service," but it was the lowest held by him after the pay of officers of the Navy was graduated by the act of 1870, according to length of service. In other words, it was the lowest position held by him after that act took effect. It seems to the court clear that the actual time of appellee's previous service must be credited to the grade of lieutenant, that being the lowest grade held by him after the act of 1870 took effect having graduated pay attached to it by that act, and not to the grade of master, which, although the lowest held by him after last entering the service, was not graduated, in respect to pay, until after he had ceased to hold it.

Now, in the case under discussion, the grade of lieutenant was graduated in respect to pay, when Green held it, by force of the act of July 15, 1870. Otherwise, how could he draw graduated pay for his services as such? As soon as the act of July 15, 1870, was approved by its express terms, it took effect from June 30, 1870, and Green recognized that, as the date when it took effect, by accepting the pay which it provided for the first three days of July. So marked is the intention of Congress to give effect to the act of July 15, 1870, as of June 30, 1870, that in the fourth section of the act it repeals a former act from and after the 30th of June, 1870. It is fully admitted that Congress could not disturb vested rights by such legislation, but, as here it was only conferring a benefit upon the persons affected, there is clearly no objection to giving effect to the intent of the legislature so plainly expressed.

It is respectfully suggested that the construction of the act of 1883, in the light of the act of 1870, given by the Court of Claims is at variance with the homely rule that "one can not eat his cake and have it too."

For the reasons given this court is asked to reverse the judgment of the court below and to enter a judgment for $4.17 in favor of the claimant.

WM. H. TAFT,
Solicitor-General.

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
JAMES G. GREEN.
No. 1343.

AGREED STATEMENT AND STIPULATION.

It is hereby agreed that it appeared in evidence in the above-named case before the Court of Claims and was undisputed that James G. Green received pay for his services to the United States rendered on July 1, 2, and 3, 1870, as a lieutenant "at sea" in first five years at the rate of $2,400 per annum, under the act approved July 15, 1870; and it is stipulated that if this fact was properly the subject of a finding by the Court of Claims herein, this agreement may be treated as such a finding and that it may be made part of the record.

JOHN PAUL JONES,
Attorney for Appellee.

WM. H. TAFT,
Solicitor-General, for Appellant.

Office Supreme Court U. S.
FILED,
JAN 5 1891
JAMES H. McKENNEY

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
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SUPPLEMENTAL BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
JAMES G. GREEN.
No. 1343.

SUPPLEMENTAL BRIEF.

Counsel for appellee have kindly informed me of a fact not alluded to in the record or the opinion of the court below, and not known to me when my original brief herein was printed, upon which they intend to claim that the act of July 15, 1870, if effect is given to its retrospective provisions as to pay, did disturb vested rights. It is said that while the act increased the pay of a lieutenant "at sea for the first five years" from $1,875, as fixed by the act of 1862, to $2,400, it cut off his allowances, which amounted before the act of July 15, 1870, to 33⅓ per cent. of his pay, or $625, which, added to his pay, made his total compensation $2,500 instead of $2,400. Therefore, it is said, the act of July 15, 1870, attempted to reduce the earned compensation of lieutenants for services rendered during the fifteen days before the act as fixed by law, and it could not be valid to that extent.

If it be conceded that a reduction of pay for services rendered is not within the power of Congress, neverthe-

less this concession is not of assistance to appellees under the circumstances stated.

The claim that Green was entitled to compensation in lieu of extra allowances in an amount equal to 33⅓ per cent. of the pay of a lieutenant "at sea" for the first three days of July, 1870, rests on an order of the Secretary of the Navy, the text of which is found in the opinion of Mr. Justice Harlan in the case of *United States* vs. *Philbrick* (120 U. S. R., 57) and is as follows:

[General Order, No. 75.]

NAVY DEPARTMENT, *May* 23, 1866.

Congress having, in view of the call for increased compensation for officers of the Navy, repealed the law which prohibited any allowance to them "for rent of quarters, or to pay rent for furniture, or for lights and fuel, etc.," the Department, in order to prevent a recurrence of the irregularities, abuses, and arbitrary allowances which occasioned the prohibition, deems it proper to establish a fixed rate of compensation in lieu of the extra allowances which were prohibited by the law now repealed. Accordingly, from and after the 1st day of June proximo, officers who are not provided with quarters on shore stations will be allowed a sum equal to 33⅓ per centum of their pay in lieu of all allowances except for mileage or traveling expenses under orders, and those provided with such quarters 20 per centum of their pay in lieu of said allowances.

The act of March, 3, 1865, having increased the pay of midshipmen and mates, the allowances hereby authorized will not be extended to them.

GIDEON WELLES,
Secretary of the Navy.

The validity of this order was sustained in the Philbrick case, in so far as to prevent the recovery by the United States of money paid out of an appropriation for the general purpose of such allowances (naval appropriation act for year ending June 30, 1870, 15 Stat. L., 276) from the officer to whom it was allowed and paid in accordance with this order.

But the validity and force of the orders depended entirely on the appropriation by Congress of the money for the general purpose of such allowances. The authority therein exercised was not a power to contract with the naval officers on behalf of the Government as to what additional compensation they should receive in lieu of allowances independent of an appropriation by Congress. It was a general order justifying allowances of a certain amount *when and if* Congress should appropriate therefor, but it was not and could not be an ordinance by the Secretary the equivalent of an act of Congress increasing the pay of officers and giving them a vested right to the same.

It can hardly be claimed that in the absence of the appropriation for such allowances a naval officer might go into the Court of Claims and recover a judgment against the Government for 33⅓ per centum addition to his pay as an amount due him in lieu of allowances under this order of the Secretary of the Navy.

That the validity and force of the order was wholly dependent on the several appropriation acts is sufficiently apparent from the language of Mr. Justice Harlan in the Philbrick Case. It was contended by the Government in that case that the order was invalid and payments under it could be recovered back, because "without legislative

sanction the Secretary of the Navy was without authority to establish an arbitrary rule for the distribution of moneys appropriated in gross for specified objects connected with the naval service, and could in no event make allowances beyond the actual cost incurred by the officer in whose behalf they were made." This was met by the court as follows:

> It is a sufficient answer to these propositions to say that the power of the Secretary *to establish rules and regulations for the apportionment of the sums set apart by Congress, in gross, for such objects as those involved in the allowances here in dispute*, having been frequently exercised prior to 1835, without objection by the legislative branch of the Government, and since that act as well as the one of 1866 is an implied recognition of the practice established in the Navy Department prior to 1835, we are not disposed at this late day to question the validity of the order of May 23, 1866.

The italics in the foregoing are not in the opinion, but they are introduced to show that the order was held valid only as a regulation of the Secretary for the distribution of sums appropriated by Congress, and not as contracts made by the Secretary on behalf of the Government with its officers. Now when the services of Green, as lieutenant, were rendered on July 1, 2, and 3, 1870, there was no money appropriated to pay these extra allowances. Therefore the order of the Secretary had no force to give the officer a vested right to them as part compensation for his services.

When the naval appropriation act, on July 15, 1870, was passed, it contained a clause in section 4 forbidding

any extra allowances from and after June 30, 1870, which prevented the operation of the order of the Secretary upon any appropriation by that act.

There being no right to compensation in lieu of extra allowances for services rendered after the 30th of June, before the act of July, 15, 1870, and there being none after the act because expressly forbidden by its terms, it follows that the pay and compensation of a lieutenant "at sea" for July 1, 2, and 3, 1870, was at the rate of $1,875 per annum as fixed by the act of 1862, and that it was increased by the act of July 15, 1870, for those same days to the rate of $2,400 per annum. It did not disturb vested rights therefore.

Finally it is immaterial whether it did or not. It has been conceded in my original brief that if the act of July 15, 1870, reduced the pay for July 1, 2, and 3, for services then rendered, it was invalid because it disturbed vested rights. This was too great a concession and was made without full consideration. The act of July 15, 1870, certainly had effect to prevent the payment of any pay to any officer for services rendered during the first fifteen days of July except in accordance with its terms, whether those terms were a violation of contract rights or not. This is because money can be taken from the Treasury only on express direction of Congress.

There can be no doubt, therefore, that the only pay which could be received by lieutenants of the Navy for the first three days of July was graduated. The question here is the construction of the act of 1883, in its application to the act of July 15, 1870. The fact that the act of

July 15, 1870, impaired contract rights to pay, can not affect the fact that it was operative to the extent of actually giving graduated pay to lieutenants for July 1, 2, and 3. The lieutenancy was, therefore, within the meaning of the act of 1883, a "grade having graduated pay held by such officers" on those days.

WM. H. TAFT,
Solicitor-General.

Office Supreme Court, U. S.
FILED.
JAN 3 1891

IN THE

Supreme Court of the United States.

No. 1343.

THE UNITED STATES

vs.

JAMES G. GREEN.

Brief for Appellee.

STATEMENT.

WM. H. TAFT,
Solicitor-General, for Appellant.

JOHN PAUL JONES,
ROBERT B. LINES,
For Appellee.

IN THE

Supreme Court of the United States.

THE UNITED STATES
vs.
JAMES G. GREEN. } No. 1343.

Brief for Appellee.

STATEMENT.

This case arises under the provisions of the act of March 3, 1883 (22 Stats. L., 473), which has been so often construed by this Court. (U. S. *v.* Rockwell, 120 U. S., 60; U. S. *v.* Mahan, 123 U. S., 186; U. S. *v.* Philbrick, 120 U. S., 52; U. S. *v.* Dunn, 120 U. S., 249; U. S. *v.* Hendee, 124 U. S., 309; U. S. *v.* Baker, 125 U. S., 646; U. S. *v.* Cook, 124 U. S., 254.)

For convenience we set out in full the portion of that act which is involved in the case at bar.

"And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the rel-

ative rank of such officers: *Provided, further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy." * * *

The sole question at issue is what is the lowest grade having graduated pay held by appellee since his entry into the regular Navy.

His record is as follows:

Acting Master's Mate, 11th May, 1861; acting Ensign, 27th November, 1862; acting Master, 11th August, 1864; Master Regular Navy, 12th March, 1868; Lieutenant, 18th December, 1868; Lieut.-Commander, 3d July, 1868; Commander, 6th March, 1887. (R., p. 2.)

Prior to July 15, 1870 (16 Stats., 321), the pay of officers of the Navy was regulated by the act of 16th July, 1862 (12 Stats. L., 583, 586) as modified by Executive order hereafter to be referred to, and neither lieutenants nor lieutenant-commanders received a pay graduated according to length of service. The Naval Appropriation act approved July 15, 1870 (*supra*) provided that *from and after June 30, 1870*, the pay of both grades should increase or be graduated by length of service.

On July 1st, 2d and 3d, appellee was still serving as a lieutenant. On the latter date he ceased to perform the duties of this grade and began to perform those of the higher grade to which he was promoted, but he was not paid his salary for these three days until after the passage of the act of July 15, 1870 (*supra*), which gave to the grade of lieutenant a graduated pay, and it is admitted that for those three days he received pay as a lieutenant in his first five years under this act instead of pay under the act of July 16, 1862 (*supra*).

It is contended on the part of the appellee, that when he held the grade of lieutenant there was no graduated pay attached to it, but that there was such pay attached

to the grade of lieutenant-commander, and that, therefore, the latter is "the lowest grade having graduated pay held by such officer since last entering the service," and consequently the one in which credit must be given for his prior service.

It is further contended that the construction insisted upon by the Honorable Solicitor-General, if permitted to prevail, would result in an infringment of claimant's vested rights.

ARGUMENT.

Appellee was a lieutenant from July 1 to July 3, 1870. Upon the latter date his service as such ceased. Upon his promotion to the grade of lieutenant-commander his contract of service in the former grade was complete, and he had forever laid aside the uniform and the duties incident to it. His right to the balance of pay then due him for service as a lieutenant had become a vested contract right to the amount of his *earned* compensation still unpaid. If he had resigned or died on that day no subsequent legislation could have deprived him, or his legal representatives, of the right to demand the unpaid compensation for services rendered under the provisions of the act of July 16, 1862 (*supra*); no less and no more. The fact that instead of resigning or dying, he was simply promoted, cannot change the legal demand which he might have made. If Congress had seen fit to give him, by the act of July 15, 1870, an increased pay for the three days, from June 30th to July 3d, it could have done so as a gratuity, and he might have had a legal right to make demand therefore; but Congress had no constitutional power to take from him all earned compensation for these three days, or even to diminish it. This proposition cannot be disputed, and is, in fact, admitted by counsel for the appellants. In his brief he says (p. 5):

"If the act of July 15, 1870, had reduced the pay for

services rendered before its passage, it would have been open to the objection of disturbing vested rights. Instead of decreasing the pay for such services, however, the act increased it and appropriated the money to cover the increase."

The Solicitor-General bases the whole of his argument upon this supposed increase, and figures out in detail how much more appellee received under the act of July 15, 1870, for July 1st, 2d, and 3d than he would have received under the act of 1862, and deduces therefrom the proposition that because he received and accepted this "gratuity," which was "a graduated pay allowed him by law," he cannot now claim that the lieutenancy was not a "grade having graduated pay held by him"; that "having accepted the benefit of the act of July 15, 1870, in its retrospective operation, he cannot now be heard to deny that the lieutenancy during July 1st, 2d, and 3d was a grade having graduated pay by law."

We are not prepared to admit this proposition, even if it were true that the act of 1870 increased the pay of this officer over that given by the act of 1862, but we do not enter into a discussion of it, because, in point of fact, the act of 1870 *decreased* that pay, as appears by reference to the case of United States *v.* Philbrick, 120 U. S., 52.

In this connection it is proper to say that this case was not mentioned in the briefs in the cause in the Court below, and was not brought to the attention of appellant's counsel until after his brief was printed, and as its involved rights depended solely upon executive order, and not upon statutory provisions, it is not surprising that it escaped his notice.

The pay of a lieutenant under the act of July 16, 1862 (12 Stats., 583, sec. 15), was, when "at sea," $1,875. Under the act of July 15, 1870, this pay was $2,400 for the first five years of service, and this was the apparent increase upon which counsel for the defendants based his

argument; but on May 23, 1866, the Secretary of the Navy issued an order increasing the pay of officers "at sea" 33⅓ per cent., so that appellee's pay, instead of being $1,875, was in fact $2,500 per annum, and the act of July 15, 1870, instead of increasing it, effected a reduction of $100 therein. The authority of the Secretary to issue such an order, and its consequent validity, was affirmed in the Philbrick case (*supra*).

It is true that the act of 1870, although approved on the 15th of July, took effect from June 30th of that year. This act was the regular annual appropriation act for the fiscal year 1870-1871, and if it had become a law, as it was anticipated it would, prior to June 30th, there could have been no such question as is here raised, but owing to the delays incident to legislation it did not become a law until after the commencement of the fiscal year for which it made appropriation, but, presumably by inadvertence, the provision that it should take effect from and after June 30th, with respect to the new pay table therein provided, was left intact. It is submitted that this retrospective operation can not be held to effect appellee's right to be paid for the three days he served as a lieutenant during July, and that he had a perfect legal right to demand that he be paid for those days according to the pay table in force by law when he performed the services, to wit: at the rate of $2,500 per annum. In point of fact he was not paid for these days until after the act of July 15th had taken effect, and when his accounts were adjusted and he was paid his salary for the month of July he was only paid at the reduced rate provided by that act. Whether his attention was called to this discrepancy or whether the amount involved being only a few cents, he declined to raise the question, does not appear, but in either event, his acceptance of the amount proferred to him could in no way have estopped him from claiming what the law gave him.

It is equally true that the act of July 15, 1870, provided that there should be a graduated pay attached to the grade of lieutenant from and after June 30th, but when that act was approved, when it became a part of the law of the land, appellee was no longer a lieutenant, and not therefore within its scope or intent.

If, as is said by the counsel for the appellants (p. 9), "it is fully admitted that Congress could not disturb vested rights by such legislation," and as it clearly and indisputably appears that no benefits were conferred, but that his salary was reduced, it is equally clear that the act of 1870, so far as it affected the grade of lieutenant by conferring upon it a graduated pay, cannot be held to deprive appellee of rights accruing under the act of March 3, 1883 (*supra.*)

Having disposed of the question upon which the counsel for the appellants seem to wholly rely, it only remains for us to call attention to the Rockwell case (*supra*) as applied to the facts in the case at bar.

We insist that when the act of 1870 became a law appellee had fully performed every obligation incident to his commission as a lieutenant; that his contract was completely performed on his part, and that no graduated pay was attached to the grade of lieutenant until after he had ceased to hold it, and that so far as he is concerned his pay then due in the grade of lieutenant, or his relation to that grade, could not be effected by the act of 1870, no matter how it might affect the pay of those who remained lieutenants after its passage. This contention is fully sustained by the Rockwell case (*supra*).

In the concluding paragraph of its opinion in that case the Supreme Court said:

"It seems to the Court clear that the actual time of appellee's previous service must be credited to the grade of lieutenant, * * * and not to the grade of master,

which, although the lowest held by him after last entering the service, *was not graduated, in respect to pay, until after he had ceased to hold it.*"

It is true that the Supreme Court used the words "took effect" in speaking of the act of 1870, but there was no question in that case as to whether the act took effect on the 1st of July, or only on the date of its approval. The latter date, July 15th, is the only one mentioned in the opinion, and the one therefore to which the Court must be supposed to have referred in saying "when the act of July 15, 1870, took effect," &c.

The case at bar is exactly similar in principle to Rockwell's. Both claimants had passed out of the grades to which it was sought to confine their longevity credit before the law was passed giving that grade a graduated pay. It makes no difference that in this case the act of 1870 appears to relate back to the time when claimant held the grade of lieutenant. For if it be conceded that the words "from and after the 30th of June" (which were inserted in the bill when it was expected to become a law before that date, and inadvertently allowed to remain) could affect claimant's pay as lieutenant, in which grade he had completed his service twelve days before, then a similar clause might have affected Rockwell's pay as master, in which grade he had completed his service two years before, and there would be no limit of time to which such retroactive legislation might not extend.

In conclusion, we beg to quote the language of the Court below as stating our position more clearly than we can do.

"* * * It (the Court) can not hold that a provision which made the new pay of all naval officers begin to run from a designated day, whether antecedent or prospective, can modify the plain language of the act of 1883. That act declares that an officer's graduated pay shall be com-

puted according to 'the lowest grade having graduated pay held' by him; and the Supreme Court has decided that this means, having graduated pay attached to the office at the time the officer held it, and not 'after he had ceased to hold it.'

"Whether the graduated pay was attached to the office of lieutenant in the navy by immediate legislation or by prospective legislation, or by retroactive legislation is immaterial if it was not attached until after the officer had ceased to be a lieutenant; and conversely if the office of lieutenant-commander was the lowest grade held by the officer which had a graduated pay attached to it at the time when he held it, it is the grade referred to in the act of 1883 upon which his graduated pay must be computed."

We respectfully ask that the judgment of the Court of Claims be affirmed.

JOHN PAUL JONES.
ROBT. B. LINES.